SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-26

FRED CARROLL LUCAS AND
WAYNE RAY LUCAS, ... Appellants

vs.

STATE OF ARKANSAS, ... Appellee

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO AFFIRM

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court, moves that the final judgment and decree of the Supreme Court of Arkansas be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

STATEMENT

Appellants addressed a North Little Rock, Arkansas Police Officer in an abusive and vulgar manner as he drove his patrol car through the parking lot of a North Little Rock motel on November 24, 1972. As the police officer was parking his car,

appellants entered a restaurant adjacent to the motel. The officer walked into the restaurant and advised Fred and Ronnie Lucas that they were under arrest. The appellants continued to revile the police officer with abusive and insulting language during the trip to the police station.

Appellants were convicted of violating Ark. Stat. Ann. §41-1412 (Repl. 1964). Their conviction and the constitutionality of the statute upon which the charge was based were upheld by the Arkansas Supreme Court in ***Lucas*** v. ***State***, 254 Ark. 584, 494 S.W.2d 705 (1973).

The Supreme Court of the United States granted certiorari on April 15, 1974, 416 U.S. 919 (1974), vacated the state court judgment and remanded the case for reconsideration by the Arkansas Supreme Court in light of ***Lewis*** v. ***City of New Orleans***, 415 U.S. 130 (1974).

Under the mandate of the United States Supreme Court, the Arkansas Supreme Court again considered appellant's cause. The Court found that Ark. Stat. Ann. §41-1412 (Repl. 1964) was constitutional in light of ***Lewis*** v. ***City of New Orleans, supra***, and reaffirmed the judgment of the trial court. ***Lucas*** v. ***State***, 257 Ark. 726, 520 S.W. 2d 224 (1975).

The statute involved is adequately set out in the Jurisdictional Statement. The appellant, pursuant to Rule 12(1) of the Rules of the Supreme Court, supplements the opinion appealed from in Appendix "A".

ARGUMENT

The decision of the Arkansas Supreme Court is plainly correct.

Appellant argues that, by reaffirming the constitutionality of Ark. Stat. Ann. §41-1412 (Repl. 1964), the Arkansas Supreme Court failed to reconsider its former opinion in light of ***Lewis*** v. ***City of New Orleans***, 415 U.S. 130 (1974). (Brief of appellant at 5.) An examination of the opinion appealed from reveals that appellant's position is incorrect.

The Supreme Court of Arkansas found substantive differences between the facially unconstitutional New Orleans Municipal Ordinance[1] and Ark. Stat. Ann. §41-1412 (Repl. 1964). As Justice Jones points out, the New Orleans City Ordinance:

> "made it unlawful and a breach of the peace to curse, revile or use obscene language ***toward*** or with ***reference to*** any member of the city police while in the actual performance of his duty regardless of when, where or to whom the language was used or addressed. Furthermore, the New Orleans Ordinance provided a one sided violation . . . . Such is not the wording effect or intent of Ark. Stat. Ann. §41-1412 (Repl. 1964)" . . . . . .

Under Ark. Stat. Ann. §41-1412 (Repl. 1964), the language must be ***profane, violent, vulgar*** or ***abusive***

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[1]New Orleans Municipal Ordinance, 828 M.C.S. §49-7 provided:

"It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."

and must be d: :ected toward or about any other person *in his presence or hearing*. Such language must *in its common acceptation be calculated to arouse to anger* the person about or to whom it is spoken or addressed, *or to cause a breach of the peace or assault.*" 257 Ark. at 728, 520 S.W. 2d at 225. [Emphasis in original.]

The defect found by this Court in *Lewis* was the failure of the Louisiana Supreme Court to make "any meaningful attempt to limit or properly define — as limited by Chaplinsky and Gooding — 'opprobrious,' or indeed any other term in" the New Orleans City Ordinance. 415 U.S. at 133. It is appellant's position that such a meaningful attempt to limit Ark. Stat. Ann. §41-1412 (Repl. 1964) has been successfully made by the Arkansas Supreme Court and that, therefore, the statute does pass constitutional muster.

As this Court pointed out in *Lewis*, a state statute which criminally punishes only spoken words will be upheld as facially constitutional if authoritatively construed by the state court as "not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." 415 U.S. at 134. The Arkansas Supreme Court has judicially construed the language of Ark. Stat. Ann. §41-1412 (Repl. 1964) to meet the constitutional test announced in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); reaffirmed in *Gooding* v. *Wilson*, 405 U.S. 518 (1972) and *Lewis* v. *City of New Orleans, supra*. By authoritative construction, Ark. Stat. Ann. §41-1412 (Repl. 1964) has been limited by the *Chaplinsky* test as applicable to only "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. at 572. Therefore, the

statute does withstand constitutional scrutiny and is neither vague nor overbroad.

In *Holmes* v. *State*, 135 Ark. 187, 204 S.W. 846 (1918), the Arkansas Supreme Court stated:

> "It is not sufficient that the language used gives offense to the person to whom or about whom it is addressed, but it must be that which in its ordinary acceptation is calculated to give offense *and* to arouse to anger." 135 Ark. at 189, 204 S.W. at 847. [Emphasis added.]

Any possible ambiguity as to the narrow application of the statute was cured by *Hammond* v. *State*, 255 Ark. 56, 498 S.W.2d 652 (1973). In that case, the Arkansas Supreme Court specifically adopted the proper constitutional guidelines of *Chaplinsky*.

. . . . . .

> "It appears clear from *Chaplinsky* that any statute punishing or regulating the use of abusive language must be limited to fighting words. If the statute appears vague and unclear on its face, it can be preserved by the courts when restricted in its application to 'fighting words' as defined by *Chaplinsky*. In other words, only that vile or abusive language which arouses anger to the extent likely to cause retaliation — fighting words — are within the meaning of the statute. With this standard or test in mind, we now turn to the evidence in this case.

. . . . . .

"It is unnecessary to show or prove that the abusive language caused a fight — it is only necessary that the abusive words were likely to cause a fight or retaliation. Furthermore, the court can take judicial notice that the abusive language used by the addressor constitutes fighting words." 255 Ark. at 58, 498 S.W. 2d at 653.

. . . . . .

There is no indication by the Supreme Court of Arkansas in their reconsideration of the instant case that they have retreated from the holdings of either *Holmes*[2] or *Hammond*.

Appellant only contends that the statute is so unconstitutionally vague that "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926). It is incongruous to assume that appellants or any "men of common intelligence" do not realize that referring to any person, even a police officer, as a "M..... F..... cop", or "son of a bitch" would be "vile and abusive language which arouses anger to the extent likely to cause retaliation — fighting words" within the meaning of the statute. *Hammond* v. *State*, 255 Ark. 56, 498 S.W.2d 652 (1973). Appellant's contention that the statute is unconstitutionally vague is without merit.[3]

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[2]Indeed, the Court relies extensively upon *Holmes* in upholding the constitutionality of the statute in its reconsideration of this case. See 257 Ark. 726, 729, 520 S.W. 2d 224, 226 (1975).

[3]The Supreme Court of Arkansas has held that the statute is constitutionally applicable when the words uttered were: "Get F....., you G..... pig," *Meyers* v. *State*, 253 Ark. 38, 484 S.W.2d 334, 336 (1972). [Addressed to a police officer.]

"[P]ig, son-of-a-bitch, mother f....., a jive white ass punk ...." *Hammond* v. *State*, 255 Ark. 56, 58, 498 S.W.2d 652, 653 (1973). [Addressed to a police officer.]

CONCLUSION

Appellee respectfully submits that the appellants present no substantial question for the decision of this Court, and that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF ARKANSAS
No. CR 73-31

Fred Carroll Lucas and Ronnie Ray Lucas, Appellants

V.

State of Arkansas, Appellee

Opinion Delivered Mar. 3, 1975

Appeal from Pulaski Circuit Court, Fourth Division

Richard B. Adkisson, Judge

AFFIRMED

GEORGE ROSE SMITH, BROWN and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. As I read *Lewis* v. *City of New Orleans*, 415 U.S. 130, 94 S. Ct. 970, 39 L. ed. 2d 214 (1973), *Gooding* v. *Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. ed. 2d 408 (1971) and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. ed. 1031 (1942), they hold that a statute punishing spoken words is overly broad and invalid when it can be applied to utterances other than those which "inflict injury or tend to invite an immediate breach of the peace." Of course, our statute in addition to fighting words, as defined in *Lewis* v. *City of New Orleans, supra*, punishes the use of profane, violent, vulgar, abusive or insulting language which in its common acceptation is calculated to arouse to anger, *Homes* v. *State*, 135 Ark. 187, 204 S.W. 846 (1918) and *State* v. *Moser*, 33 Ark. 140 (1878). As pointed out in *Cox* v. *Louisiana*, 379 U.S. 536, 85 S. Ct. 453, 13 L. ed. 471 (1965), speech that arouses or stirs people to anger is protected by the Constitution of the United States.

Consequently, it appears to me that the one sentence opinion by the majority of the United States Supreme Court gave us a sufficient guide to determine the constitutionality of our statute, Ark. Stat. Ann. § 41-1412 (Repl. 1964), when it referred us to *Lewis* v. *City of New Orleans, supra*.

For the reasons stated I would hold the statute invalid.

GEORGE ROSE SMITH and BROWN, JJ., join in this dissent.